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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 466.

DEPARTMENT OF BANKING, STATE OF NEBRASKA as Receiver and Liquidating Agent of Farmers State Bank, Callaway, Nebraska, *Petitioner,*

against

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the National Surety Company.

PETITION FOR REHEARING.

WALTER R. JOHNSON,
Attorney General of the State of Nebraska,
Counsel for Petitioner.

MORRIS AMCHAN,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING.

May It Please the Court:

Your petitioner, the Department of Banking, State of Nebraska, respectfully presents this petition for re-hearing and prays that the order of this Court denying the petition for certiorari for want of jurisdiction, be vacated as having been improvidently denied.

On December 21, 1942, this Court in a *per curiam* opinion, denied the petition for certiorari on the ground that it was not filed within the time provided by law.

By order of this Court, petitioner's time within which to file a petition for rehearing herein was extended to and including March 15, 1943.

A.

On June 18, 1942, the Court of Appeals of the State of New York affirmed the judgment of the Appellate Division of the Supreme Court and issued its remittitur on that day. No opinion was rendered by the Court.

On July 15, 1942, petitioner made a motion in the Court of Appeals, returnable at the first motion day after the rendition of the judgment of June 18th, for an order, "recalling the remittitur herein and upon such recall to amend it in the particulars requested in the annexed affidavit, and for such other and further relief as to the Court may seem just and proper." The particulars requested in the affidavit were (1) recalling the remittitur for the purpose of adding and indicating the consideration and decision of a federal question necessary to the case, and (2) for the purpose of amending the remittitur as to costs.

The motion was opposed by the Liquidator who submitted papers thereon. Thereafter the Court granted appellant's motion in part, by recalling the remittitur and amending it by adding thereto a statement that a federal question was presented and necessarily passed upon by the Court.

The date of the amended remittitur is July 29, 1942. The petition for certiorari was filed on October 20, 1942.

Counsel in filing the petition for certiorari computed the statutory three month period from the date of the amended remittitur. Although neither counsel suggested or raised any question as to the jurisdiction of this Court with respect to the timeliness of the petition, nevertheless, the Court, *sua sponte* and without the assistance of briefs or argument of counsel ruled that the time within which to file the petition began to run from the date of the first remittitur rather than from the date of the amended remittitur.

In this petition for rehearing, therefore, the jurisdictional point is being presented and argued for the first time.

B.

Counsel in computing the time from the date of the amended remittitur, followed and relied upon recent decisions of this Court which plainly indicate that without the amended remittitur in the record, this Court would have no jurisdiction to review the judgment of the State court. The cases relied upon by counsel seem to have required us to proceed in the manner that we did.

Lynch v. *New York*, 293 U. S. 52
Villa v. *Van Schaick*, 299 U. S. 152
International Steel Co. v. *Surety Co.*, 297 U. S. 657, 662
Honeyman v. *Hanan*, 300 U. S. 14, 25
Minn. v. *National Tea Co.*, 309 U. S. 551, 555
Bakery Drivers Local v. *Wohl*, 315 U. S. 769.

The fact that counsel for appellee did not raise any question as to jurisdiction is not without significance. In *Villa* v. *Van Schaick*, 299 U. S. 152, the appellee, who is the same public official that is the appellee in the case at bar, moved to dismiss an appeal filed in this Court on an *identical* state of facts, the point was specifically argued, and this Court rejected then the contention of the appellee. On that experience that argument was not again made by appellee and we venture to suggest this as the reason why the point of jurisdiction was not raised by counsel.

In the *Villa*, case, *supra* (and we have examined the transcript of the record and briefs filed in this Court) the facts were as follows:

February 26, 1935—date of remittitur of the Court of Appeals.

March 20, 1935—order of Court of Appeals denying reargument.

April 5, 1935—Appeal to Supreme Court filed.

October 22, 1935—Appeal dismissed for "want of a properly presented federal question." (296 U. S. 544.)

November 18, 1935—Motion by appellant in Court of Appeals to recall and amend its remittitur dated February 26th, by adding thereto consideration and desion of federal question.

November 26, 1935—Amended remittitur of the Court of Appeals adding a statement that it considered and passed upon a federal question.

The text of the amended remittitur appears in the Transcript of the Record at page 55, and is *identical* in terminology with the amended remittitur filed in the case at bar, probably because the practice of the Court of Appeals is to use a printed form.

Thereafter a new judgment was entered in the Supreme Court of the State of New York on the amended remittitur of the Court of Appeals, and computing the time from the date of entry of the new judgment, an appeal was filed again.

This judgment entered after the date of the amended remittitur of the Court of Appeals was characterized by appellant in his brief (p. 4), as, "a new judgment in conformity with the amended remittitur of the Court of Appeals and was in no respect an application for new, different or other relief than had been sought by this motion for an amendment of the remittitur in the Court of Appeals."

On this state of the record, the appellee, the Superintendent of Insurance of the State of New York, moved to dismiss the appeal, and in his brief, presented the following argument (p. 5, et seq.):

"*Statement Against Jurisdiction*"

"Appellee respectfully submits the following grounds making against the jurisdiction of this Court:

(1) *The appeal herein is untimely, as it is not taken within the time allowed by Statute for the same* (Rev. Stat. 1008; Title 28 USCA, section 350).

* * * * * * * * *

Appellee contends that the three months statutory period for taking an appeal to this Court is mandatory and jurisdictional. Consequently, the time for taking an appeal cannot be extended by waiver, consent or order of the Court.

Appellee further contends that the judgment or decree referred to in R. S. 1008, is the final order and judgment of the Court of Appeals of the State of New York, and not the order and judgment of the Supreme Court of the State of New York upon the order, judgment or remittitur of the Court of Appeals.

Appellee contends that in view of the fact that the time to appeal to this Court had expired at the time when the applications to recall and amend the remittitur of the Court of Appeals were made to, and granted by that Court, the said amendments can in no wise operate to extend the appellants time to appeal to this Court. To permit such result, would be tantamount to a nullification, circumvention and evasion of R. S. 1008. *Besides, appellee submits that the various amendments to the remittitur did not and could not affect the date, or the finality of the original order or judgment of the Court of Appeals, dated February 26, 1935.*" (Italics in original brief.)

In reply, Appellant's Brief in Opposition to Appellee's Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, argued (page 6):

"(2) *The appeal herein has been taken within the time allowed by statute for the same.*

The Court of Appeals had complete power over its remittitur to amend it in whatsoever way it deemed proper in furtherance of the interests of justice. * * *

Prior to the amendment of its remittitur by the Court of Appeals there was no judgment appealable to the Supreme Court of The United States. This is established by the dismissal of the appeal from the former judgment by this Court. * * *

It certainly cannot be said that the time to appeal to this Court begins to run prior to such time as a judgment is entered which is appealable to this Court. What the appellants are really contending is that the

> Court of Appeals should not have amended its remittitur and directed the entry of a new judgment thereon."

With the point thus squarely presented to this Court, it was held that the appeal was timely filed.

The *Villa* case, it should be noted, involved a question relating to the liquidation in New York State, of an interstate insurance company. The local bar, whose practice particularly deal with such problems was well aware of the contested points of procedure and practice relating to appeals to this court from a judgment of a state court. Counsel in the case at bar particularly relied on the above decision of this court establishing the practice to be followed in such cases.

C.

Without the amended remittitur in the record reciting that a federal question was presented and necessarily passed upon by the State Court, the petition for certiorari, under decisions of this Court, would have been dismissed for want of a properly presented federal question.

Lynch v. *New York*, 293 U. S. 52.

As a direct result of the decision in that case, the practice developed in New York (and sanctioned by this Court), in cases where an appeal or petition to this Court was contemplated, to move to amend the remittitur so as to indicate that a federal question was presented and necessarily passed upon by the Court. Such an application in the State Court cannot be considered as a *pro forma* application for a correction of the record, especially so when the judgment of the State Court may rest on two grounds, one involving a federal question and the other not. This was demonstrated in the *Lynch* case, *supra*, where the appellant, acting on the suggestion of this Court (293 U. S. at p. 54) made application to the New York Court of Appeals to

amend the remittitur. The application was denied. (266 N. Y. 431.)

Where the record fails to disclose that a federal question was presented and necessarily passed upon, this Court has declined to entertain jurisdiction and has remanded the cause to the State court for amendment, and on a supplemented record containing such amendment, this Court has entertained jurisdiction in an appeal or petition for certiorari.

Honeyman v. *Hanan*, 300 U. S. 14, at p. 25
Int'l Steel Co. v. *Surety Co.*, 297 U. S. 657, at p. 662
Minn. v. *Nat'l Tea Co.*, 309 U. S. 551, 555
Whitney v. *California*, 274 U. S. 357, 360-362.

Relying on the above authority, the bar, we respectfully submit, had reason to believe that until the judgment of the State Court clearly disclosed that a federal question was presented and necessarily passed upon by the Court, there was no judgment that was appealable to this Court, and the time within which to appeal or apply for certiorari began to run from the date of the amended judgment.

Cf. *North American Cement Co.* v. *Graves*, 299 U. S. 517 (where the remittitur of the Court was dated Nov. 20, 1935; the amended remittitur, March 10, 1936; petition for appeal filed May 1, 1936; jurisdiction entertained).

Recently, in *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, this Court again indicated, that the time to appeal or apply for a writ of certiorari begins to run from the date of the amended remittitur which recites that a federal question was presented and necessarily passed upon by the Court.

In that case, the remittitur of the Court of Appeals of the State of New York was dated December 31, 1940.

On March 28, 1941, a petition for certiorari was filed.

On May 5, 1941, this Court denied the petition (313 U. S. 572), on the ground that "it does not appear from the record that the federal question presented by the petition was

necessarily decided by the Court of Appeals," citing, *Lynch* v. *New York,* and *Honeyman* v. *Hanan, supra.*

On May 21, 1941, petitioner moved in the New York Court of Appeals "for an order amending the remittitur herein by adding thereto a statement declaring that in the determination of the case, the Court necessarily decided the federal question."

On May 27, 1941, remittitur amended by adding the statement that a federal question was presented and necessarily passed upon. (285 N. Y. 843)

May 29, 1941, petition for rehearing filed in this Court.

June 2, 1941, petition for rehearing granted, order denying certiorari vacated and writ of certiorari granted. (313 U. S. 548)

In an opinion, at 315 U. S. 769, the judgment of the Court of Appeals was reversed.

Had petitioner applied to this Court for a writ of certiorari without having in the record the amended remittitur, the appellee would have invoked the rule that where a judgment of the state court rests on two grounds, one involving a federal question, and the other not, this Court is without jurisdiction unless it clearly appears that the federal question was presented and necessarily passed upon. It was vital to petitioner therefore to secure such a statement from the Court below.

When appellant moved in the Court of Appeals to recall the remittitur and amend it, the respondent submitted an affidavit in opposition stating:

> "this affidavit is submitted in opposition to the motion of the appellant to recall and to amend the remittitur of this Court dated June 18, 1942, in two respects; first, that a question under the Federal Constitution was presented and necessarily passed upon in this proceeding by this Court; and second, that the order be affirmed without costs."

When appellant in the Court of Appeals on this motion called attention among other things, to the fact that the Court below had disallowed the claim on the ground that the "judgment obtained by claimant in the State of Nebraska is not entitled to full faith and credit in New York State, nor is it binding on the Liquidator", and that this federal question was raised and pressed throughout the proceedings, the Liquidator in his opposing affidavit argued:

> "It is therefore submitted that the claimant misconstrued the effect of the law of Nebraska in transmitting the assets to New York, for at no time did the claimant question the effectiveness of the order of liquidation in terminating the corporate existence of the Company. * * *
>
> Under these circumstances, no Federal Constitutional question was presented and necessarily passed by this Court, but rather the question of whether the transfer of assets to New York by Nebraska operated to permit the bringing of actions against a dissolved corporation contrary to principles established by common law. * * *
>
> Wherefore deponent respectfully prays that the motion to recall and to amend the remittitur of this Court dated, June 18, 1942, be in all respects denied with costs."

The amended remittitur, in the light of the above, cannot be considered as a ministerial or *pro forma* judgment of the court.

A reasonable construction of the authorities above referred to compels the conclusion that this court construed its jurisdiction with respect to computing time within which an appeal or application for a writ may be made, to run from the date of the amended judgment which indicated that a federal question was considered and passed upon by the court. It would be wholly unreasonable, in our opinion, to say that jurisdiction does not lie in this case, but does lie where an appeal or application for certiorari is taken

from an amended judgment reciting that a federal question has been considered and passed upon;—where the petition or appeal had been previously dismissed for want of a properly presented federal question.

CONCLUSION.

We have indicated in our original petition that the federal question here presented is one of public importance, which is further attested by the fact that fourteen sovereign states by their Attorneys General have filed briefs *amici curiae,* urging reversal of the judgment below. The decision of the Court of Appeals, is, as we have indicated, also in conflict with applicable decisions of this Court.

We respectfully pray therefore that the order denying the petition for a writ be vacated as having been improvidently denied, and the petition for a writ of certiorari be granted.

DEPARTMENT OF BANKING, STATE OF NEBRASKA,
Petitioner,

By WALTER R. JOHNSON,
Attorney General of the State of Nebraska,
Counsel for Petitioner.

MORRIS AMCHAN,
Of Counsel.

The undersigned, Counsel for petitioner herein, does hereby certify that this petition is filed in good faith and not for the purpose of delay.

Dated: March 1943.

WALTER R. JOHNSON.